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In the Supreme Court of the United States

OCTOBER TERM, 1933

STATE OF FLORIDA, EUGENE S. MATTHEWS, MAMIE EATON-GREEN, and W. B. DOUGLASS, etc., ET AL,
Appellants,

VERSUS

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, GEORGIA PUBLIC SERVICE COMMISSION, and ATLANTIC COAST LINE RAILROAD COMPANY,
Appellees.

No. 342

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION

BRIEF FOR ATLANTIC COAST LINE RAILROAD COMPANY, REPLYING TO THE MAIN BRIEF OF APPELLANTS AND TO THE SEPARATE BRIEF OF APPELLANT, WILSON LUMBER COMPANY OF FLORIDA, AND TO THE SUPPLEMENTAL AND SEPARATE BRIEF OF THE STATE OF FLORIDA AND THE RAILROAD COMMISSIONERS OF FLORIDA

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February 12, 1934.

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REPLYING TO THE ARGUMENT THAT THE AMENDMENT TO §15*a* OF THE INTERSTATE COMMERCE ACT BY THE EMERGENCY RAILROAD TRANSPORTATION ACT OF 1933 DESTROYS THE ACTION OF THE COMMISSION AND DECREE OF THE COURT IN THIS CASE.

This is the only subject dealt with in the separate brief of the appellant, Wilson Lumber Company of Florida. It is also dealt with in the supplemental and separate brief of the State of Florida and the Railroad Commissioners of Florida, beginning at page 5.

Counsel for Wilson Lumber Company states (p. 3 of brief) that:

> "The sole purpose of this separate brief is to present the suggestion that the order of the Interstate Commerce Commission here in issue, even if valid when made, which is, of course, not conceded, must now be set aside because the statute upon which rested the authority to make such order has now been repealed and a new statute enacted."

At page 5 of the same brief, it is stated:

> "The order of the Interstate Commerce Commission here in issue is based solely on the power of the Commission to change intrastate rates to remove a revenue burden on interstate commerce, the Commission having expressly refused to find the existence of discrimination against persons and localities."

FALLACY OF THIS POSITION.

It is claimed that the power of the Interstate Commerce Commission to fix intrastate rates to remove a revenue burden on interstate commerce generally was never expressly granted by any Act of Congress. It is thought that, because this court in the case of *Wisconsin Railroad Commissioners v. United States*, 257 U. S. 563 dealt with the "dovetail" relationship between sections 13(4) and 15*a*(2) of the Interstate Commerce Act, as amended by the Transportation Act, the power of the Interstate Commission to remove discrimination worked against intrastate commerce depended upon section 15*a*.

Section 13(4) of the Act authorizes and directs the Commission to

> "prescribe the rate, fare or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation, or practice thereafter to be observed"; etc.,

which might be necessary to remove any "rate, fare, charge, classification, regulation or practice" which causes any "undue or unreasonable advantage, preference, or prejudice as between persons and localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, *or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is hereby forbidden and declared to be unlawful.*" (Italics added).

This court in the Wisconsin case at page 586 fully recognizes that ¶4 of §13 of the Act gives to the Interstate Commission "direct power to remove 'any undue, unreasonable

or unjust discrimination against interstate or foreign commerce'." It is true that the court there says:

> "It is impossible to escape the dovetail relation between that provision and the purpose of §15*a*."

The purpose of §15*a* was declared at page 585 by the court to be that

> "The new measure imposed an affirmative duty on the Interstate Commerce Commission to fix rates and to take other important steps to maintain an adequate railway service for the people of the United States. This is expressly declared in §15*a* to be one of the purposes of the bill."

There was never a lack of power on the part of the Congress to enact a law of this sort for the purpose of preventing interstate commerce being discriminated against by intrastate commerce. This has been recognized by the court, and especially in the *Minnesota Rate Cases*, 230 U. S. 352, at 411 where the court said:

> "When, however, the State in dealing with its internal commerce undertakes to regulate instrumentalities which are also used in interstate commerce, its action is necessarily subject to the exercise by Congress of its authority to control such instrumentalities so far as may be necessary for the purpose of enabling it to discharge its constitutional function."

The court also held:

> "The authority of Congress extends to every part of interstate commerce and to every instrumentality or agency by which it is carried on; and the full control by Congress over the subjects committed to its regulation is not to be denied or thwarted by the commingling of

interstate and intrastate operations." *Minnesota Rate Cases*, 230 U. S. 353.

The court in the Wisconsin case, did not refer to the relation between §13(4) and §15*a* for the purpose of finding power either in the Constitution or in the Congress or in the Act to Regulate Commerce but it referred to that relation for the purpose of finding the proper construction of §13(4) for the court there stated that §13(4) had for the first time vested the Commission "with a direct power to remove 'any undue, unreasonable, or unjust discrimination against interstate or foreign commerce.'" (257 U. S. 586).

The Purpose of Subsection 2 of §15*a* of the Act Was Not Changed.

It is of course, common knowledge that railroads have been passing through an extremely unfortunate economic period.

§15*a*(5) and (6) had provided for a recapture of excess earnings and the Congress by the Emergency Railroad Transportation Act of 1933 intended to retroactively relieve the railroads of that obligation. The caption of the Act known as the Emergency Railroad Transportation Act of 1933, is:

> "An Act to Relieve the Existing National Emergency in Relation to Interstate Railroad Transportation, and to Amend Sections 5, 15*a*, and 19*a* of the Interstate Commerce Act, as amended."

The cause of the adoption of this Act was the relief needed by the railroads.

§15*a*(2) of the Interstate Commerce Act as now amended is as follows:

> "In the exercise of its power to prescribe just and reasonable rates the Commission *shall* give due consideration, among other factors, to the effect of rates on the movement of traffic; *to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenue sufficient to enable the carrier, under honest, economical, and efficient management, to provide such service.*" (Italics added).

The words of this amended section 15*a*(2) were probably intended to mean what they did mean under the original ¶2 of §15*a* of the Act, being amended so far as that was consistent with the relief from the recapture clause. §15*a* as thus amended still shows the same purpose which the court noted in the Wisconsin case (257 U. S. 585) that

> "The new measure imposed an affirmative duty on the Interstate Commerce Commission to fix rates and to take other important steps to maintain an adequate railway service for the people of the United States. This is expressly declared in §15*a* to be one of the purposes of the bill."

Turn to §15*a* (2) of the Act as amended June 16, 1933 and we find that the Commission is required (the word is "shall") "in the exercise of its power to prescribe just and reasonable rates" to "give due consideration . . . to the effect of rates on the movement of traffic; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenue sufficient to enable the carrier,

under honest, economical and efficient management, to provide such service."

There is no change whatever in the purpose of the old and the new sections. The Commission is no longer required to determine and make public what percentage on the aggregate property value constitutes a fair rate, none the less, the Constitution requires that rates so far as reasonable and just rates may do so, shall be sufficient to give a fair return upon the property used.

Congress shows the same concern to maintain an adequate and efficient railway transportation service and it also shows the same concern to furnish to the carriers the needed revenue sufficient to enable them, under honest, economical and efficient management to provide such service. The language of the amendment closely approaches the language of §15*a* (3).

The major premise of appellants' position is that the Interstate Commerce Commission no longer has the power to prevent unjust discrimination against interstate commerce which is caused by making of intrastate rates so low that they will not bear their fair proportionate share of the expense of maintaining the railway system used in both intrastate and interstate commerce.

The result of sustaining this position would be to hold that the Commission would not have the power to remove any discrimination against interstate commerce involved in a general disparity between interstate and intrastate rates.

Another effect of sustaining appellants' position as to this would be to hold that the Interstate Commission has no longer

the power to prevent the States from making rates so low that the intrastate commerce would not carry its fair proportionate share of the expense of maintaining the transportation system used in interstate and intrastate commerce. That would be a tremendous backward step. The necessity of this provision of the Interstate Commerce Act is almost as important as is the act itself.

The Emergency Railroad Transportation Act of 1933 in some of its features was under construction by the Circuit Court of Appeals of the Fifth Circuit in *Quannah, A. & P. Rwy. Co. v. Panhandle & S. A. Rwy. Co.*, 67 Fed. (2d) 826. The matter there under consideration was the discontinuance of through joint routes. While nothing in that decision directly affects the matter here under consideration, it is clear from the opinion as a whole, that the court did not think that new Act curtailed the power of the Interstate Commerce Commission to take such action as might be necessary in the public interests to maintain an adequate and efficient railway transportation service, in so far as that might be maintained in the exercise of the Commission's power to prescribe just and reasonable rates. This decision also indicates that the effect of the Emergency Railroad Transportation Act can not be presented in this cause because the action of the Commission and decree of the lower court were entered prior to the enactment of that law.

The Action of the Interstate Commerce Commission in this Case and the Decision of the Court Sustaining that Action Were Both Made Before the Enactment of the Emergency Railroad Transportation Act, 1933.

If the enactment of the Emergency Railroad Transportation Act of 1933 had the effect of depriving the Commission of the power to remove unjust discrimination against interstate commerce worked by unduly low intrastate rates, and of destroying its action in this case, it would have the effect of tearing down every rate structure which the Interstate Commerce Commission has made under this power.

The Interstate Commission's report and order in this case was entered July 5, 1932. It was suspended, as has been pointed out in our main brief, and the proceedings before it reopened, and another report and order were entered on January 9, 1933. The decision of the District Court appealed from to this Court was entered February 24, 1933. The Emergency Railroad Transportation Act of 1933 was adopted on June 16, 1933. The status of the rates complained of had been fixed by the Commission and adjudicated by the Court prior thereto.

REPLYING TO POINT I OF APPELLANTS' MAIN BRIEF (p. 37)

This point claims that on January 9, 1933 and on July 5, 1932 the times at which the Interstate Commerce Commission entered its second and first reports on the further hearing, there was no substantial disparity between the Cummer scale of rates and the interstate scale of rates throughout the Southern territory. The same point is made as Point III of the Supplemental and Separate Brief of the State of Florida, at page 36.

The report and order which were entered on July 5, 1932 by the Interstate Commerce Commission (186 I. C. C. 157) we refer to as the Commission's second report. The report and order entered on January 9, 1933 (190 I. C. C. 588) we refer to as the Commission's third report.

The rates which are referred to as being in effect on July 5, 1932 and January 9, 1933 and which are relied upon by appellants to show the absence of disparity in the rates are discussed in the third report of the Commission (190 I. C. C. 588). The Interstate Commission considered each of the tariffs putting into effect what are called the Newly Reduced Rates. No one of those tariffs was effective over all of any system of railroads except three which may be seen from page 48, et seq. of appellants' main brief. They were the Nashville, Chattanooga & St. Louis Railway Company; the Gulf, Mobile & Northern Railway Company; and the Georgia & Florida Railway Company. They were limited as to points of origin and points of destination. Turn to page 49 of our opponents' main brief and note the Illinois Central Railroad and the sharp limitation as to stations of origin and destina-

tion o. .nese rates on that system. These rates were put into effect for limited times. As we have heretofore shown, they are experimental. We do not think the statement at page 61 of appellants' brief, to the following effect, is accurate:

> "The maps (R. 388 and 490) attached to the supplemental bills of complaint of the State of Florida and of the Wilson Cypress Company and Wilson Lumber Company, as Exhibit 'D' to those bills, respectively, show graphically the widespread application of these Newly Reduced Rates, both in Southern and Southwestern territory. They are applicable in intrastate and interstate commerce in Florida upon four railroads."

These rates are applicable between some points on all of those roads but they are applicable between only very limited points on most of them, as we have pointed out. Their limited application is shown in the appellants' briefs. The limited application of these rates is pointed out very carefully by the Interstate Commission in its third report (190 I. C. C. 588-590). There isn't a single one of the rates applicable in Southern Florida. The basis of the rates, that is, per carload without regard to weight, is calculated to produce the utmost discrimination. Equality under those rates could only be accidental. Two shippers at the same point of origin desiring to ship logs to the same destination might ask for cars and one would get a car of 60,000 capacity and another of 120,000 capacity and those shipments would move to the same point of destination; they would pay the same rate and plainly one shipment would have gotten twice as much service as the other.

The Commission fully considered the claims made in this section of the brief and had evidence from each of the rail-

roads concerned as well as other evidence. It made its third finding (190 I. C. C. 588) dealing fully with that evidence and holding that they were not sufficient to sustain the claim of the appellants.

THE SO-CALLED NEW RATES WERE OFFERED ONLY AS RATE COMPARISONS.

Those new rates were after all nothing but rate comparisons. It was not claimed by any of the roads that those rates paid their way. They were put in as an experimental effort to recover traffic which had been lost to truck competition, and the evidence of the several witnesses was in effect that this had largely failed for distances above twenty-five miles. Note the evidence of the witnesses J. W. Perrin (R. beginning 1048), C. D. Thomas (R. 1037, recalled at 1069), M. W. Thomas (R. 1030), E. R. Gardner (R. 1024), and H. B. Norden (R. 1012). The evidence of these witnesses has been referred to in our main brief.

At page 65 of the main brief appellants claim that the Interstate Commission stated in its order of July 5, 1933, "without any evidence to that effect in the record" that the logs were freely moving throughout the South upon rates the same or substantially the same as those prescribed by its order here involved. Appellants state that it is difficult to understand why nearly all of the major railroads in the South should at or about that very time voluntarily and with the permission of the Commission reduce their rates to the level of the Cummer scale. The *answer is, they did not do that.* Certain rates were reduced between certain places and for limited distances,—except in very few instances never in ex-

cess of 100 miles because of particular circumstances. This part of the brief is likely to carry with it the thought that the rates have been reduced over the whole territory and over all of each line, which as we have oftentimes stated is incorrect.

Answering subparagraph (*d*) of Point I of appellants main brief (page 65) which is headed: "The attempt of the Interstate Commerce Commission to differentiate between the Newly-Reduced Rates in the Southern Rate Group and the rates properly applicable in Florida".

Appellant states that in attempting to make the distinction between the newly reduced rates and the Cummer scale the Interstate Commission has ignored the fact that it refused to receive the evidence to show that no such distinction could be drawn.

The record before the Interstate Commission shows (R. 900) the Florida lumber companies, who were intervenors in this case, offered to prove that in practical operation and effect the Cummer scale as applied in Florida was tantamount to a transit scale in that the Atlantic Coast Line got the outbound movement of lumber under the Cummer scale.

Turning to Record 900 we find that counsel for appellants stated to the Examiner:

> "Then am I to understand that your Honor has ruled that whether or not these tariffs are transit rates or local rates makes no difference in the level of the rates and the propriety of that level."

Examiner Hoy answered:

> "I am not making any ruling as to that. You are putting in your evidence as to changes in the rates on logs and circumstances and conditions which occasion those changes, and then evidence as to whether such circumstances and conditions or any of them are present in respect to the Florida intrastate rates on logs."

Mr. Adair pressed his position to show that in effect the Cummer scale as applied in Florida is tantamount to a transit scale, and the Examiner ruled:

> "My ruling will have to be that that evidence is not admissible under the order reopening the case."

THIS QUESTION HAS BEEN DEALT WITH IN THE PRIOR HEARINGS IN THIS CASE.

The purpose of having the logs shipped from the woods to the tidewater was to have the lumber shipped from the manufacturing points at ocean rates. Notwithstanding this, Exhibit 54 shows and the evidence of the witness Perrin (R. 654, 655) shows that the so-called Cummer scale applies although the Coast Line does not have the benefit of the transit features. Manifestly, under this plan the rates to the mills apply, whether or not the output of the mills is shipped by the line transporting the logs and the same local rates apply even in case where there is no manufactured product to be shipped by rail. An examination of Exhibit 54 confirms this and so does an examination of Appendix B to the report in the 186 I. C. C. 193.

In discussing this same heading at pages 68 and 69 reference is made to the fact that the Commission (190 I. C. C. 599) pointed out that in its report of July 5, 1932 that in certain other proceedings arbitraries or higher charges have been permitted for the transportation of certain commodities in the Florida peninsula, which arbitraries were in two particular instances as much as approximately forty per cent higher than the remainder of Southern territory, and then states:

> "This proceeding is the first time that Commission has ever suggested an arbitrary ranging from one hundred per cent to more than three hundred and fifty per cent."

That statement, if applied to the record here, is not justified. Mr. Perrin testified (R. 653) and there is no contradiction of his evidence, that:

> "The interstate basis of rates on logs prescribed by the Commission for application between Georgia and Florida is now applicable interstate over the entire system of the Atlantic Coast Line except that in South Florida the present interstate scale is 15 per cent higher."

Appellants' main brief then discusses the difference between transportation conditions in Florida and elsewhere, where the newly reduced rates are in effect. It says that "the only difference which the report points out between those conditions is the fact that the Interstate Commerce Commission in other proceedings has, in a few instances, permitted a higher rate in the Florida peninsula."

The Commission has in its several reports in this case, as we have pointed out, shown the difference in density of traffic in the Florida peninsula and on other parts of the Atlantic Coast Line's system (180 I. C. C. 164) where the Commission went into some detail. It also found that the operating conditions in southern Florida are very much less favorable than on other parts of the Coast Line's System (180 I. C. C. 164) and cited previous decisions to the same effect. At page 183 of the same report the Commission again found that the operating costs per unit in Florida are generally higher in Florida than the average for the Coast Line's System as a whole either including or excluding Florida; that for the year 1929 freight-traffic density in Florida, expressed in terms of revenue ton-miles per mile of road operated was 62.8 per cent of that for the system including Florida, and 50.4 per cent of that for the system excluding Florida; using a five-year average, 1926 to 1930, inclusive, freight-traffic density in Florida was 72.8 per cent of that for the system including Florida, and 63.9 per cent of that for the system excluding Florida; that in 1929 the freight-service train-miles in Florida were 30.63 per cent of those for the system including Florida, and freight-service locomotive-miles in Florida were 30.92 per cent of those for the system, including Florida, while loaded freight car-miles in Florida were 21.25 per cent of those for the system including Florida; loaded and empty freight car-miles in Florida were 22.43 per cent of those for the system including Florida, and revenue ton-miles in Florida were 25.05 per cent of those for the system including Florida; that in 1929 the trains operated in freight service hauled an average of 18.16 loaded cars or 31.69 loaded and empty cars per train in Florida, as compared

with 26.17 loaded cars or 43.28 loaded and empty cars per train on the system, including Florida.

This part of appellants' brief appears to proceed on the theory that the log traffic in Florida was not to bear its fair part of the general expenses attributable to the carrying on of the business of the carrier, which is, of course, incorrect. See *Banton v. Belt Line Railway Co.*, 268 U. S. 413, 421.

It appears further to be based upon the theory that this is intrastate traffic and the fact that Florida is a terminal State has no bearing on the subject (p. 72 of appellants' brief). Again that argument is based purely on the theory that the log traffic is not to bear its proper proportion of the other expenses of the carrier.

These questions of fact have been held against appellant by the Commission.

REPLYING TO SUBPARAGRAPH (E) OF POINT C OF APPELLANTS' MAIN BRIEF (P. 73) ENTITLED: "THERE WAS NO 'SUBSTANTIAL DISPARITY' BETWEEN INTERSTATE AND INTRASTATE RATES UPON WHICH THE COMMISSION COULD ACT."

This point is also made at page 36 of the Supplemental and Separate Brief of the State of Florida.

It is difficult to understand the theory upon which this point is approached. This part of Appellants' main brief starts out with the statement that:

> "There has been no change in the boundaries of the Southern rate group since it was designated by the Commission pursuant to Section 15*a*."

It claims that the Commission was giving its tacit approval to reduction in rates in other parts of the territory by not cancelling or suspending them as they were filed. Unless complaints are made, the Commission does not, as a rule, interfere with tariffs, especially when they reduce rates. The right of the Commission to suspend tariffs which reduce rates is more limited than is its jurisdiction to suspend tariffs which increase rates. The fact that the Commission does not suspend a tariff does not mean that it has approved the rates therein contained.

Appellants are not justified in saying:

> "The standards by which the Commission unfavorably measured the Cummer Scale were swept away."

As we have shown in our main brief, the newly reduced rates were in effect only in a relatively few places and if they applied throughout any entire System, it was only as to two or three. They did not supplant the other rates on the Systems on which they applied.

These rates were not put in as reasonable or compensatory. They have been put in experimentally for the purpose of defeating truck competition. The Commission found, after considering all the newly reduced rates before it:

> "Transportation conditions are not substantially similar throughout southern territory. In our prior report on further hearing we specifically found that the circumstances and conditions surrounding the transportation of these logs intrastate in Florida were not on the whole as favorable as the circumstances and conditions surrounding the interstate movement of logs over defendant's lines. Therein we also pointed out that the less favorable

operating conditions in the Florida peninsula than in the remainder of southern territory have given rise to the general practice of permitting the addition of arbitraries to the rates on interstate traffic to and from points in that territory"; etc. (190 I. C. C. 599).

It is a mistake to infer, as is done on page 74 of appellants' main brief that the Commission has not fixed interstate rates on logs from Florida points to Georgia. The Commission has made findings and orders with respect to the corresponding interstate rates from Northern Florida which is defined in the order, to points in Georgia and it has fixed the rates from Southern Florida to Georgia, as we have heretofore pointed out.

Nor is it correct to infer as is done at page 74 of appellants' main brief that the general level of the rates on the commodity of logs in the rate group, as voluntarily established by the railroads and permitted by the Commission, is substantially the same as the intrastate rate which the Commission seeks to supersede by its order.

It is incorrect to say as is said at page 74:

> "Not even on the Atlantic Coast Line Railroad has the Commission ever fixed interstate rates on the commodity except from the small portion of Northern Florida where no logs ever moved in interstate commerce."

As we have heretofore pointed out, Mr. Perrin at R-653 testified that the interstate basis of rates on logs prescribed by the Commission for application between Georgia and Florida were then and are now applicable interstate over the entire System of the Coast Line except in South Florida where the present interstate scale is 15% higher.

Appellants' Argument That the Traffic of Only One Railroad is Affected, and Therefore, the Commission's Jurisdiction Fails, is Fallacious.

Let us suppose that a railroad's traffic interstate and intrastate, was confined to one commodity and that the volume was very large. The appellants would claim that the traffic in that commodity, however great it might be was exempt from the rule of law which makes unjust discrimination against interstate commerce unlawful and that the Interstate Commerce Commission had no power to correct it.

Let us suppose that a railroad had many kinds of traffic, but that the traffic in the commodity concerned was very large; that the volume amounted to practically ten per cent. of its traffic in the offending State. (The percentage of Florida log traffic to total Florida traffic in the year 1928 was 9.4%—186 I. C. C. 166). Appellants would take the position that discrimination against interstate commerce worked by an improper reduction of rates on this ten per cent. of intrastate commerce could not be remedied. Appellants do not disclose how much of a railroad's traffic must be involved in the unjust discrimination before the Commission's jurisdiction to grant relief would affix. Presumably they do not entirely eliminate the jurisdiction of the Commission to relieve unjust discrimination worked by intrastate commerce against interstate commerce but just how much of the carrier's commerce must be affected before this jurisdiction attaches they do not disclose.

Under appellants' plan it would be unimportant apparently that every other railroad in the State of Florida which carries

logs was charging for the same service approximately twice as much as was being charged in this case by the Coast Line. Apparently it does not matter that the evidence amply showed, and the Commission found, that the Cummer scale of rates the Florida state scale applicable to this traffic over the Atlantic Coast Line was less than compensatory when the cost of transportation alone was considered.

The thought of the appellants is apparently based on the further idea, that is, that under §15*a* of the Interstate Commerce Act a state may make rates for one railroad which discriminate against interstate commerce because they are so low that they do not carry their fair proportionate share of the expense of maintaining that railroad's system used in both interstate and intrastate commerce, but jurisdiction of the Interstate Commerce Commission does not attach unless those rates apply to every road in the group. In other words, appellants' apparent contention is that the Commission's power to remove unjust discrimination worked against interstate commerce by intrastate rates is invoked only when the whole group of railroads is broken down at one time. The group may be destroyed one by one without invoking the power of the Commission to prevent it. Appellants' position is equivalent to destroying the Commission's entire jurisdiction over the subject.

The purpose of §15*a* as originally adopted and as recently amended is "to maintain an adequate railway service for the people of the United States."

When this case was before this court on the first appeal (282 U. S. 211) the court held:

"As intrastate rates and the income from them must play a most important part in maintaining such a system, the effective operation of the act requires that intrastate traffic should pay 'a fair proportionate share' of the cost of maintenance. And if there is interference with the accomplishment of the purpose of the Congress because of a disparity of intrastate rates as compared with interstate rates, the Commission is authorized to end the disparity by directly removing it."

That case holds that the Commission has the jurisdiction to remove the identical discrimination referred to in this case. The discrimination found by the Commission in this case to be undue was "inimicable to the proper interests of interstate commerce."

In *Western Pacific Calif. Rd. Co. v. Southern Pacific Co.*, 284 U. S. 47, 51 the court reaffirms its decision in *Texas & Pacific Ry. Co. v. Gulf, Colorado & Santa Fe Ry. Co.*, 270 U. S. 266 referring to the fact that that decision recognized "that the preservation of the earning capacity and conservation of the financial resources, of *individual carriers* is a matter of national concern;" etc. (Italics added).

SIMILITUDE OF CASES DEALING WITH ABANDONMENT OF RAILROADS AS AUTHORIZED BY ¶¶18 AND 20 OF §1 OF THE INTERSTATE COMMERCE ACT.

In dealing with the authority of the Interstate Commission to abandon railroads which is contained in paragraphs 18 and 20 of §1 of the Interstate Commerce Act, the court held in *Colorado v. United States*, 271 U. S. 153, 162, 163, as follows:

"The Commission by its order removes an obstruction which would otherwise prevent the railroad from per-

forming its federal duty. *Prejudice to interstate commerce may be effected in many ways. One way is by excessive expenditures from the common fund in the local interest, thereby lessening the ability of the carrier properly to serve interstate commerce. Expenditures in the local interest may be so large as to compel the carrier to raise reasonable interstate rates, or to abstain from making an appropriate reduction of such rates, or to curtail interstate service, or to forego facilities needed in interstate commerce. Likewise, excessive local expenditures may so weaken the financial condition of the carrier as to raise the cost of securing capital required for providing transportation facilities used in the service, and thus compel an increase of rates.*" (Italics added).

The Court proceeds at pages 163 and 164 to say:

"The exertion of the federal power to prevent prejudice to interstate commerce so arising from the operation of a branch in intrastate commerce is similar to that exerted when a state establishes intrastate rates so low that intrastate traffic does not bear its fair share of the cost of the service, *Railroad Commission of Wisconsin v. Chicago, Burlington, & Quincy R. R. Co.*, 257 U. S. 563; *Nashville, Chattanooga, & St. Louis Ry. v. Tennessee*, 262 U. S. 318; or when the state authorities seek to compel the erection of a union station so expensive as unduly to deplete the financial resources of the carriers, *Railroad Commission v. Southern Pacific Co.*, 264 U. S. 331; or when one railroad seeks to construct an intrastate branch line, which will deplete its own financial resources or those of another interstate carrier, *Texas & Pacific Ry. Co. v. Gulf, Colorado & Santa Fe Ry. Co.*, 270 U. S. 266. The jurisdiction exercised by the Commission in these cases is in essence that which was invoked in *The Shreveport Case*, 234 U. S. 342, a power to prevent unjust preference to particular intrastate shippers or localities at the demonstrated expense of interstate commerce. But there is a broader basis for federal control."

The court further held in the Colorado case:

> "The obligation assumed by the corporation under its charter of providing intrastate service on every part of its line within the state is subordinate to the performance by it of its federal duty, also assumed, efficiently to render transportation services in interstate commerce. . . . Because the same instrumentality serves both, Congress has power to assume not only some control but paramount control in so far as interstate commerce is involved. It may determine to what extent and in what manner intrastate service must be subordinated in order that interstate service may be adequately rendered. The power to make the determination inheres in the United States as an incident of its power over interstate commerce. The making of this determination involves an exercise of judgment upon the facts of the particular case. The authority to find the facts and to exercise thereon the judgment whether abandonment is consistent with public convenience and necessity, Congress conferred upon the Commission." (p. 165, 166).

The case of *Transit Commission v. United States*, 284 U. S. 360 at 368 strongly restates the same position as is stated in the Colorado case.

See also *Western Pacific Railroad Co. v. Southern Pacific*, 284 U. S. 47, 51.

We have heretofore shown in the Atlantic Coast Line's main brief (pp. 44, et seq.) and also in this brief (pp. 29-32) the tremendous volume of traffic involved in this case. Under the findings of the Interstate Commission, amply supported by the evidence, the gross revenue from this traffic was insufficient to pay the cost of rendering the transportation service, and that without regard to any reward or profit to the carrier.

For instance, the operating costs and taxes ascertained by the Commission for the average haul were $19.06 per car against an average gross revenue of $15.12 per car (180 I. C. C. 180) or $3.94 per car loss, and that before any sum whatever is added for return on investment. That means before any interest is paid on any funded or unfunded indebtedness or any return is made to the stockholders.

For the years 1920-1930, both inclusive, the total number of cars of logs moving intrastate in Florida over the Atlantic Coast Line was 121,916. The bare loss becomes enormous, bringing these facts within the principles of the *Colorado v. United States case*, 271 U. S. 153 and the other cases referred to.

THE FACT THAT ONLY ONE COMMODITY IS INVOLVED DOES NOT AFFECT THE JURISDICTION OF THE COMMISSION.

In the case of *Nashville, Chattanooga and St. Louis Railway v. State of Tennessee*, 262 U. S. 318, the court sustained the Interstate Commission's order overthrowing a state rate in the following circumstances:

The Interstate Commission authorized a general increase, throughout southern territory of 25 per cent in interstate freight rates. The State of Tennessee authorized a like increase in intrastate rates but excepted from the increase "carload shipments of stone and gravel, when for use in building public highways, and consigned to Federal, state, county, and municipal authorities, or their bona fide agents." The carriers applied to the Interstate Commerce Commission claiming that the exception produced illegal discrimination against

interstate commerce and an undue prejudice to persons and localities engaged in such commerce. The Commission found unjust discrimination and ordered that the intrastate rates on those commodities, also, be increased to the level of the interstate rates.

The court held that §22 of the Interstate Commerce Act which permits free transportation or reduced rates in certain circumstances, must be read in connection with the rest of the act, and further held:

> "The grant of a lower rate on road material to a government engaged in highway construction may benefit the government without subjecting to prejudice any person, locality, or class of traffic. But a lower rate may result in giving to a single quarry within the state all of the governmental business, so that competing quarries and localities within or without the state, or *interstate traffic*, would be prejudiced. That such undue discrimination does, and will result from the order of the Tennessee Commission, was expressly found by the Interstate Commerce Commission." (p. 323, Italics added).

In that case there was one commodity involved moving to one class of shippers.

This court held, in effect, that in *Missouri Pacific Rd. Co. v. Boone*, 270 U. S. 466, 469, that the State had the power to restore the full statutory liability as to the carriage of baggage as applied to intrastate commerce "unless the Interstate Commerce Commission should, *for the purpose of preventing discrimination against interstate commerce*, issue an order under Transportation Act 1920, to the contrary."

The Court also held in *United States v. Village of Hubbard*, 260 U. S. 174, that the Interstate Commerce Commission had the right to raise interurban railroad fares to avoid discrimination against interstate commerce.

One of the Purposes of the Interstate Commerce Act as Amended by the Transportation Act is to Build Up an Adequate and Efficient Railway Transportation Service.

This court declared in *Dayton-Goose Creek Rwy. v. United States*, 263 U. S. 456, 478 that:

> "The new act seeks affirmatively to build up a system of railways prepared to handle promptly all the interstate traffic of the country. It aims to give the owners of the railways an opportunity to earn enough to maintain their properties and equipment in such a state of efficiency that they can carry well this burden. To achieve this great purpose, it puts the railroad systems of the country more completely than ever under the fostering guardianship and control of the Commission, which is to supervise their issue of securities, their car supply and distribution, their joint use of terminals, their construction of new lines, their abandonment of old lines, and by a proper division of joint rates, and by fixing adequate rates for interstate commerce, *and in case of discrimination, for intrastate commerce, to secure a fair return upon the properties of the carriers engaged.*" (Italics added).

REPLYING TO POINTS II AND III OF APPELLANTS' MAIN BRIEF (p. 81, 85).

This point is stated in appellants' main brief at page 81 as follows:

> "The Interstate Commerce Commission has failed to make the basic or essential findings necessary to support a statewide order prescribing intrastate rates. There is no substantial evidence before the Commission to support such findings."

This same point is made as point IV (p. 43) of the Supplemental and Separate brief of the State of Florida.

This point II will be treated or replied to by us along with point III which appears to cover the same ground (p. 85, appellants' main brief) to the effect that:

> "There was no finding and no evidence of the amount of revenue which had been derived in the past from this particular traffic in question under the Cummer scale of rates."

The Necessity of Proof of Amount of Revenue Derived in the Past by the Carrier.

It is asserted as one of the premises upon which appellants proceed that the law requires that the amount of revenue which had been derived in the past by the carrier from the particular traffic in question under the existing intrastate rates must be shown.

No authority for that statement is cited. The argument is based upon the statement of this court in the former case, (282 U. S. 214), where the court stated:

> "The Commission made no findings as to the revenue which had been derived by the carrier from the traffic in question, or which could reasonably be expected under the increased rates, or that the alteration of the intrastate rates would produce, or was likely to produce, additional income necessary to prevent an undue burden upon the carrier's interstate revenues and to maintain an adequate transportation service."

This does not hold that the gross amount of revenue derived from the traffic moved must be proved. It is intended that findings should be made that the amount of traffic was material and the amount of discrimination substantial. *Louisiana Commission v. Texas & New Orleans R. R.*, 284 U. S. 125. The record contains a great deal of evidence showing the amount of revenue derived from this traffic, the volume of the traffic and the cost of this transportation service and the Commission made substantial findings in reference thereto.

In order to reply to these points a summation and some repetition of statements contained in the Atlantic Coast Line's principal brief will be necessary. (See page 44 et seq. of the brief).

The Commission found on ample evidence that from February 8, 1929 to January 31, 1931, when the increased intrastate rates fixed by the Commission were in effect in Florida, 18,002 cars of logs moved intrastate in Florida over the lines of the Coast Line; that the gross revenues from those cars were $571,508.94; that if the Cummer scale had been ap-

plied the revenues would have been $281,225.75 or $290,283.19 less than those actually collected. (See p. 44 of main brief for Coast Line; exhibit 61 (R-1101); and 186 I. C. C. 167).

During the years 1929 and 1930 if the Cummer scale of rates had been in effect over the entire system of the Atlantic Coast Line, it would have received $665,520.92 less than it did receive from its log traffic. (R-662-3; pages 44, 45 of our main brief; 186 I. C. C. 168).

In the five years from 1926-1930 the Commission found that the number of cars of logs hauled by the Atlantic Coast Line in Florida were as follows:

1926, 36,799 cars; 1927, 35,415; 1928, 27,119; 1929, 13,207; and 1930, 9,375, or a total of 121,916 cars. (186 I. C. C. 169).

From 1923-1928 the Atlantic Coast Line's gross revenues from the movement to Eastport (suburb of Jacksonville) averaged $309,882.60 a year; and that its gross revenues from the movements to the Putnam mills averaged slightly more than $200,000. a year. (186 I. C. C. 169).

From 1926-1930 the Wilson Cypress Company shipped 21,800 cars of logs and paid $562,295.38 in revenues to the Coast Line (R-779).

The Putnam Lumber Company for the years 1923-1926 and about one-half of 1927 paid to the Coast Line revenues aggregating $1,017,141.41.

Exhibit 35 (first record, 36) shows the available timber of the Putnam Lumber Company on December 31, 1925,

which aggregated 1,099,000,968 feet. It showed for the years 1919-1925 that this company shipped 53,410 cars of logs and paid $1,021,061.33 freight revenues during that period. The same exhibit shows the same kind of information as to the cypress lumber shipped by the Putnam Lumber Company to Ortega, Florida.

The record (R-706) shows that the Brooks-Scanlon Corporation shipped from 1915-1929, both inclusive, 163,245 cars of logs and paid revenues aggregating $3,182,952.

The Commission found (186 I. C. C. 166) that for the five years 1926-1930, the System's log traffic averaged 7% of the total System traffic; and that 50% of the System's log traffic was in Florida.

The amount of pine timber standing in Florida was found by the Commission to be practically twenty-two billion feet; the annual production of cypress in Florida the Commission found to be around two hundred million feet; and that hardwood constitutes probably from five to ten per cent. of the total business (186 I. C. C. 173).

The Commission follows those findings with a statement by the Atlantic Coast Line's freight traffic manager as to the effect which would be produced if the Coast Line hauled in the future what appeared to him to be a fair part of the standing timber under the Cummer scale of rates as compared with the rates found by the Interstate Commission to be reasonable. Mr. Perrin, the freight traffic manager there stated that the difference in the amount of revenues from the two scales would be $2,779,968. We have referred to this in the main brief at pages 60 and 61. That is, the revenue

under the Cummer scale would be that much less than the revenue under the scale of rates found by the Interstate Commission to be reasonable and to be the minimum rates necessary to prevent unjust discrimination against interstate commerce. The traffic manager understated those figures and by a mathematical error the difference calculated by him was only about one-tenth of what it should have been. The difference in the revenue which would be received under the two scales of rates would be $28,046,667.20 instead of $2,779,968, and these figures deal only with pine. They do not include cypress or hardwood.

We have heretofore referred to the finding of the Interstate Commission to the effect that from February 8, 1929 to January 31, 1931 there were shipped over the lines of the Atlantic Coast Line in Florida 18,602 cars of logs and that the gross revenues derived under the increased intrastate scale fixed by the Interstate Commission were $571,508.94. If we divide that gross revenue by the number of cars we get an average revenue of $30.72 per car. Under the Cummer scale the revenue would have been $281,225.75. Dividing that revenue by 18,602 cars we get an average revenue of $15.12 per car.

The Commission found that 121,916 cars of logs were shipped over the Atlantic Coast Line intrastate in Florida from 1926 through 1930. (186 I. C. C. 169, see Exhibit 30 R-1134c). Under the Cummer scale the approximate revenue from those 121,916 cars of logs would have been $1,843,369.92; and under the increased scale of rates fixed by the Interstate Commission as the minimum rate necessary to remove the unjust discrimination against interstate commerce, the approximate revenue would have been

$3,745,259.52 or a difference of $1,901,869.60. It must be remembered that the trainload shipments to Eastport, Milldale and Ortega, Florida were discontinued early in 1929; otherwise the difference would have been greater.

THE FINDING OF THE DISTRICT-COURT ON THIS SUBJECT.

The court below found as follows:

> "It was found that there was no profit but an out-of-pocket loss to the carrier in the log traffic under these rates, not considering taxes and return on the investment, and that consequently there was no contribution to the maintenance of the carrier as an efficient instrumentality of commerce, but a drain upon it. The total amount of this drain before 1929 was not found, nor could it be approximated from the evidence. But for the two years, 1929 and 1930, when the interstate rates fixed by the Interstate Commerce Commission were enforced, the log traffic under them was 18,602 cars and the gross revenue from this intrastate traffic was $571,508.94, whereas if the Cummer scale had been applied it would have been $281,225.75." (*State of Florida v. United States*, 4 Fed. Sup. 477; see also pp. 36 and 37 of *Statement of the Atlantic Coast Line Railroad Company Opposing Jurisdiction and Motion to Dismiss or Affirm*).

REPLYING TO POINT IV OF APPELLANTS' MAIN BRIEF (p. 94)

This same contention is made in the separate brief for the State of Florida, Point IV (*b*) at page 45.

The contention is that the Commission made no finding of the *amount* of revenue which can reasonably be expected from the transportation of logs in the future under the increased scale of rates.

We have already shown in replying to Point III of the appellants' brief that the Commission did make findings as to the revenue heretofore derived from log shipments under the Cummer scale of rates.

As a matter of fact, the estimate of future earnings made by the Commission was based on *facts and figures* which were *actual* and arose in the "abnormal period." The Commission found that 2,765 cars actually moved over the Coast Line from February, 1931, to June, 1931 (186 I. C. C. 476). It is reasonable to say that this estimate was an absolute minimum and even assuming a continuance of these "abnormal conditions," the estimated figure is conservative.

The Atchison, Topeka & Santa Fe Railway Company case, 281 U. S. 248, cited by appellants as authority for the reopening of this investigation which was granted and resulted in the third report (190 I. C. C. 583). The findings after this investigation for the third time submitted in November, 1932, were handed down January 9, 1933. Every finding made in the previous reports were then reasserted and affirmed (190

I. C. C. 600). This third investigation went on in the very midst of the "abnormal period."

In subsection (1) of Point IV of appellants' main brief (p. 101) the effect of the rate increase on the investments of the large shippers, appellants here, is discussed. This situation was submitted in the evidence before the Commission and the District Court. The Commission undoubtedly considered it and gave it such weight as seemed proper to it in determining the justness and reasonableness of the rate prescribed. But such considerations cannot be the sole basis of a rate order. (*Southern Pacific v. Interstate Commerce Commission*, 219 U. S. 433). Certainly that alone cannot avail in this Court to overturn an order unfavorable to appellants.

uation was submitted in the evidence before the Commission and the District Court. The Commission undoubtedly considered it and gave it such weight as seemed proper to it in determining the justness and reasonableness of the rate prescribed. But such considerations cannot be the sole basis of a rate order. (*Southern Pacific v. Interstate Commerce Commission*, 219 U. S. 433). Certainly that alone cannot avail in this Court to overturn an order unfavorable to appellants.

The very figures used by appellants' counsel in this discussion (appellants' brief, p. 102) show to some extent the revenue previously derived from this traffic and reasonably in prospect for future transportation of logs.

The question before this court is, as we understand it, not what rate the Commission should have made for the future—that is a legislative question to be otherwise treated; but, did the Florida intrastate scale of rates, applicable to the transportation of logs over the Atlantic Coast Line Railroad Company in Florida for distances of 170 miles and less, work an unjust discrimination against interstate commerce?

In subsections (2) through (5) of Point IV (pp. 109-118) appellants' counsel urge their theory of what the Commission should have found on the evidence before it as to the reason for the decline in the log traffic from 1929 through 1931.

The Commission considered all of these contentions (186 I. C. C. 168-172) and in the light of its long experience gave it such weight as seemed to it reasonable. The Commission found:

> "* * * This depressed condition, in our (their) opinion, has been and will be of far greater importance than the level of the Florida log rates in determining the extent of the movement in the immediate future at least. * * *" (186 I. C. C. 188).

The Commission also found that from April 10, 1931, to November, 1932, the period in which the Cummer scale was restored, there was "no substantial increase" in the log movement.

> "* * * This depressed condition, in our (their) opinion, has been and will be of far greater importance than the level of the Florida log rates in determining the extent of the movement in the immediate future at least. * * *" (186 I. C. C. 188).

The Commission also found that from April 10, 1931, to November, 1932, the period in which the Cummer scale was restored, there was "no substantial increase" in the log movement.

REPLYING TO POINT V OF APPELLANTS' MAIN BRIEF (p. 119)

The position that the evidence does not support a finding, and there is no finding, that the increased rates would produce additional *income* necessary to prevent an undue burden and to maintain an adequate National transportation system is also urged in the separate brief filed for the State of Florida, Point IV (c) (page 97). This contention is based primarily on appellants' criticism of the cost evidence reviewed by the Coast Line and the cost study of the Interstate Commission, which is more fully discussed in our reply to Point VII. in this brief.

We wish to call attention of appellants' use of the word "income" in this section of their brief. The evil in this case sought to be remedied is that heretofore this log traffic has moved at a loss; there has been no net income from it; it has drained the resources of the Coast Line and made necessary the allocation of funds or service to the log traffic in Florida, thus weakening the resources necessary to maintain an adequate National transportation system for use in interstate and intrastate commerce. If this order of the Commission stops these losses and does nothing more, it has strengthened the Coast Line's transportation system.

But the Commission goes further after consideration of the facts: (1) movement of the mills to the timber; (2) the abnormal conditions; (3) the depression generally and particularly in the lumber business, (4) the expiration of old traffic contracts; it specifically finds that the *gross revenues* of the carrier on a minimum movement of logs will be increased over $100,000 per year. (R-66; 186 I. C. C. 188-9).

REPLYING TO POINT VI
OF APPELLANTS' MAIN BRIEF (p. 127)

Appellants, for the purposes of their contention, assert that even assuming an unjust discrimination (such as has been proven in this case) to exist, it is of such small character and consequence that the Commission should close its eyes to it. The doctrine of "*de minimis non curat lex*" is invoked. It is urged that this whole problem is a question merely of degree.

We submit that if a rate does not produce sufficient revenue to cover the cost of the service performed, without considering overhead and general expenses, it has no place in a carrier's tariffs, and if the disparity is so great as to cause losses sufficient to work unjust discrimination against interstate commerce to a substantial extent, the Commission is charged with the duty of removing that discrimination.

The Commission finds (130 I. C. C. 139) as follows:

> "Accordingly, on the basis of an average of 7,434 cars a year under normal economic conditions, which basis we believe conservative; the gross revenues under the rates prescribed by the previous order herein would be more than $100,000 a year greater than under the Cummer scale, now in effect. The application of the Cummer scale, therefore, places a substantial burden upon defendant's interstate revenues. If the revenues yielded by the Cummer scale are not sufficient to cover the cost of the service, as the cost evidence indicates, it would follow that part of the above-stated amount would constitute a dead loss in net revenue."

Let us suppose that the Cummer scale had not been removed and the movements of logs in Florida returned to their former

quantity, and other mill plants had built up around those movements and around those rates. Plainly this would have worked the destruction of the Atlantic Coast Line; for there is a loss to the railroad on every ton and on every car of these logs which moved under the Cummer scale of rates. The discrimination against interstate commerce would have been appalling; it would not only have seriously affected the power of the Coast Line to render interstate transportation, *but any other kind* of transportation service.

This case seems to be controlled by *Louisiana Public Service Commission v. Texas & New Orleans Railroad Co.*, 284 U. S., 125, where the rates on gravel, sand, crushed stone, etc., were under consideration. There is a comparison of the Louisiana rates at page 131 with those prescribed by the Interstate Commerce Commission. The court said:

> "The latter (the I. C. C. rates) are about 150% of the former. For 30 miles about the average intrastate haul, the prescribed rates are higher by 30 cents per ton, for 100 miles 10 cents, 120 miles 50 cents, 140 miles 40 cents, and 200 miles 60 cents. Producers outside Louisiana are necessarily at disadvantage in respect of the sale and delivery within that state of such materials to the extent that the state rates are lower than the prescribed scale."

Those facts and that ruling precisely fit the case at bar.

REPLYING TO POINT VII
APPELLANTS' MAIN BRIEF (p. 130)

At page 130 of Appellants' main brief is discussed Point VII under six subheads. The same contentions are made in point V, page 51 of the separate brief for the State of Florida. We wish to call the Court's attention to several contentions therein made which we deem proper to be commented on and in some instances corrected.

The very vital finding of the Interstate Commission, to-wit:

> "From the evidence submitted in this case, however, *we are convinced* that the defendant's revenue under the Cummer scale of $15.12 per car for transporting a car of logs weighing 50,754 pounds a distance of 31 miles, and transporting the empty car back, is insufficient *under all the circumstances and conditions*, to cover *the full cost of the service.*" (186 I. C. C. 187. Italics added).

is sought to be demolished by close scrutiny of the "Cost and Revenue Studies" submitted, not by Appellants, but by the Atlantic Coast Line. From these studies the Commission worked out to its satisfaction the result announced in this investigation. Appellants presented no affirmative evidence tending to show the cost of transporting logs in Florida.

(*a*) Mr. Lamb's use of the term "Haulage Expense" is criticized. In his testimony we find a clear explanation of his definition of that term.

> "There seems to be some misunderstanding on Mr. Pettijohn's part as to the figures shown on my Exhibit 84 and referred to in his Exhibit 109. Possibly I did

not make it clear on my direct testimony, but the so called haulage expenses are not to be considered as the technically known haulage and non haulage expenses, which would be derived from Dr. Lorenz' formula in Docket 17000, nor were they intended to be. What I attempted to do upon my Exhibit No. 31 was to eliminate from the total freight operating expenses sufficient accounts which would, in my opinion, *give costs below the actual costs of handling logs or any other commodity. I have eliminated all yard accounts, regardless of whether or not they applied to the log service. Unquestionably some of these expenses are properly attributable to handling logs. Other accounts were also eliminated. But it should be distinctly understood that no effort was made to develop what are technically known as haulage and non haulage expenses. By the elimination of all yard accounts and certain other accounts, I felt I had established a minimum from which we could build up some figure or figures which would give the Commission some idea as to where the costs lay.*" (R 906, Italics added).

The Commission, or any other persons even acquainted with rates and cost studies take it as axiomatic that "it is *impossible* on a system like the defendant's, engaged in the transportation of all kinds of freight and of passengers, to determine accurately the *exact cost* of transporting *one commodity*." (130 I. C. C. 437).

Approximation, therefore, is the nearest approach to out-of-pocket cost or expense that can be made. Lamb's theory or formula has much to commend it. (Exhibits 86 to 99, inclusive; see Appendices to our main brief). It is based on a long experience. Column A of his exhibits is a minimum figure and column B a maximum, leaving a field of reason-

ableness between these two figures on which the quasi judicial function of the Commission may operate and adequately support any final determination made within those limits. Lamb's method was far from illogical or fallacious. The Commission found his operating expense figures in column A properly to be not "actual" but "constructive" expenses, which understated the true figure to an unknown extent.

Lamb's figures (so-called haulage expense, equated by a ratio of five and stated in column A of his exhibit), as criticized on page 134 of appellants' main brief, are not "just as applicable to perishable and expensive fruit and vegetable traffic in Florida as to logs," for the reason that Lamb eliminated *all terminal expenses* at the outset, which is the basis of attributing the higher expense to transportation of perishable commodities. The extra handling of refrigerator cars in placement for icing, the extra expense of expediting the perishables through the terminals are some of the principal causes of the greater expense attached to this class of traffic. Appellants' counsel ignore the fact that *all of this terminal expense* was eliminated by Mr. Lamb in arriving at the lower figure in column A. Again on page 135 of the appellants' main brief this same contention is reasserted only to be answered by a consideration of the same fact. Lamb entirely eliminated all terminal expenses in arriving at his lower figure.

The Commission, after stating that Lamb's higher out-of-pocket expense figure of 0.0882888 cent per gross ton mile is higher than the actual out-of-pocket cost of the Florida log traffic, goes on to state:

On the other hand it appears that the unit out-of-pocket cost figure developed (by Lamb) in connection with the Hines to Palatka movement 0.06'0833 cent per gross ton mile is below the average out of pocket cost of the Florida log transportation. That movement, it must be remembered was a regular one in trainload lots of 40 to 50 cars. The cost of handling such solid trainloads direct between two given points, without any intermediate train break up in classification yards and without any switching enroute, is undoubtedly less than on single carload movements which are handled in ordinary pick up service." (336 I. C. C. 133).

This Hines to Palatka movement was the least expensive movement of any of the log traffic because it moved in solid trainloads of 40 to 50 cars for a distance of 119 miles. Perrin's exhibit No. 61, sheet 2 (R 1105) shows a substantial movement, 2005 cars, between Homosassa and La Crosse during the period February 9, 1930, to January 31, 1931. It so happens that this movement was in trainload lots also but consisted of only 25 cars and for a distance of only 68 miles. It is readily apparent that the cost of this last named movement must necessarily be greater per unit than for the Hines to Palatka movement. It is also true, by reason of the *light* weight of the train and the *shorter distance*, that the cost per unit may be greater than the average cost on the Third Division.

(c) Appellants' counsel attack the use of "System Averages" as improper in arriving at the cost of transportation of a particular commodity. The cost study compiled by the Commission was *to some extent* based on figures obtained from data of the Atlantic Coast Line giving the average cost of transportation on its system as a whole. It is true that such a basis

is not desirable. The Commission knew this and doubtless had in mind the case cited (*Northern Pacific R. Co. v. Department of Public Works*, 268 U. S. 39). The facts of that case, when read with reference to the opinion of the Court, show that the investigation there is not comparable to this one in the case at bar. The principles announced by the court are recognized as sound. The Commission said:

> "*Ordinarily* it would be unsound to use a system unit cost to determine the cost on a particular State, but since it is *indisputable* that unit costs are higher in Florida than elsewhere on the system, it seems clear that unit costs may be used to *find a cost* that may be said to be less than the cost in Florida." (183 I. C. C. 134, Italics added.)

(c) Under this subhead (page 139 of appellants' brief) it is contended that the Interstate Commission discarded the cost studies introduced by the Coast Line. We cannot agree that the Commission did this. They used the data obtained from these studies and exhibits to make their own cost study and merely approached the question differently, balancing the scale of their judgment with a few different considerations or interests.

The State of Florida (a "terminal" State), because of a natural or geographical disadvantage from a transportation viewpoint, cannot capitalize on that fact and attain an *advantage in log transportation* at the expense of sister states not so located with reference to the Coast Line's system. A contention based on this fact is made at page 140 of the appellants' main brief.

The repeated reference to perishable traffic overlooks the fact that in the system traffic as a whole, including Florida, the percentage of this perishable traffic (2% per cent of total Florida traffic, witness Pettyjohn, R 3869) is reduced to a very much smaller figure when grouped with the tremendous non perishable traffic produced by the other states through which the Coast Line operates. From the table (1936 I. C. C. 166) this percentage of perishables to total system traffic roughly becomes 10% per cent for 1928, 11.3 per cent for 1929, and 11.1 per cent for 1930. In criticizing the use of system averages appellants' counsel overlook the fact that the Commission (as did Lamb) made allowance for this class of traffic by certain eliminated accounts.

> "In this computation attempt has been made to meet as far as possible the criticisms of the defendant's cost evidence. For instance, deduction from the freight service operating expenses has been made for wharves and docks, maintenance and operation of floating equipment, and certain traffic expenses, which the defendant concedes are not involved in handling logs." (1936 I. C. C. 135.)

So that even the so called system average has been reduced by an elimination of accounts directly connected with the perishable traffic which otherwise would be necessarily included in the system figures.

The measure of the "average cost of handling all log traffic on the system in the year 1929" is a very important determination. Had the intrastate rate on logs sought to be determined been for application in the State of North Carolina or South Carolina (both of which are not "terminal" states) a different emphasis would be put on this finding, but

since it was to be applied in Florida and the finding with reference to that state being. "Transportation conditions in Florida are not such as warrant a lower basis of rates on logs in the State than elsewhere on defendant's system. Transportation conditions on defendant's lines in Florida are not more favorable, but on the contrary are less favorable than on defendant's system outside of Florida. The cost of the service in Florida is higher than on the remainder of the system, as shown by cost evidence referred to in detail hereafter. Density of traffic in Florida is much lighter than on defendant's lines elsewhere." (186 I. C. C. 163 64)

And again "There appears to be no doubt that the operating costs per unit are generally higher in Florida than the average for the defendant's system as a whole, either including or excluding Florida" (186 I. C. C. 183) it is evident that average system costs assume a vastly more important aspect in this particular investigation than it would in the ordinary investigation.

The cost study worked out by the Commission (Appendix E 186 I. C. C. 196 7) is ridiculed as being a feat of legerdemain at page 141 of appellants' main brief. Counsel for appellant would have the Court believe that this Appendix E. is "a highly involved statistical compilation." This criticism is not warranted by the facts in this record. Any one at all familiar with cost studies can readily follow each step. The information with respect to operating expenses $30,303,313.00, under the heading "Basic Data" (186 I. C. C. 196) comes directly from Lamb's exhibit No. 24 (R. 1132). It does require computations to develop the percentage of certain superintendence accounts eliminated by the Commission.

The proportion of the expenses for superintendence as well as their proportion of the general expenses are deductions made on the percentage worked out by the Commission in the light of their experience.

In the apportionment of "haulage" and "non haulage" accounts appellants' own witness, Pettijohn, (R. 370 71) supplied the percentage upon which the apportionment was made (70.3539 per cent to haulage and 29.6461 per cent to non haulage, "these percentages being based upon the road and yard proportions of certain of the expenses for maintenance of way and structures and for transportation which are segregated in the accounts between these services in accordance with our rules").

The first item at the top of page 197 (186 I. C. C.) Gross Ton Miles, 11,000,329,000, is computed from figures found in Pettijohn's Exhibit 110 (R-1164). The total in car-miles of loaded, empty, and caboose freight and mixed train operating statistics, 354,451,657 car-miles is multiplied by the average weight of the car and lading, 32.731 plus tons, which figure is approximated from the average revenue load of 15.7397 tons, plus the average weight of cars and cabooses.

The next figure, Revenue ton miles 3,281,770,000, comes from the record Lamb's Exhibit, No. 83 (R. 1136) and is also found in Pettijohn's Exhibit No. 108 (R-1158).

The fourth figure, loaded car-miles (revenue and non-revenue) 209,835,784, comes from Pettijohn's Exhibit No. 110 (R-1164).

The next figure is a computation.

The sixth figure, Total Revenue Tons carried 18,951,802, comes from Pettijohn's Exhibit No. 104 (R-1154).

The next figure is a quotient obtained by dividing the average revenue ton per loaded car into the total of revenue tons carried, and the next figure is a computation from that quotient.

Taxes are developed from Lamb's exhibit No. 85 (R-1139). The figure for total operating expenses (freight and passenger) is obtained from Lamb's exhibit No. 78, line 15 (R-1134). The taxes per dollar of operating expense are a mere computation. Interest on the investment at 5¾ per cent comes from three items in Lamb's exhibit 85 (R-1139). All the statistical data for the log traffic in Florida used in the computation of costs will be found in Lamb's exhibit 86 (R-1140) and the computations of the cost are mere calculations applied to these statistics. Bearing this in mind, the statement of appellants' counsel that "the data relied upon to produce the result are not supported by record reference save in one instance; where else in the record these various data appear is a matter upon which the Commission has failed to enlighten either the parties or the Court," would seem out of place. In ascertaining a rate, reason demands that honest estimates must be made, and this estimate of the Commission is amply supported by the evidence in this record.

The Commission properly recognizes that it is impossible with absolute mathematical accuracy to definitely develop the actual cost of handling any one commodity, but it does develop a cost which it states (186 I. C. C. 187) "the above figures undoubtedly understate the cost of transporting logs

in Florida for several reasons" and then it states some of these reasons. (See 130 I. C. C. 183-184).

Appellants claim that the Commission only eliminated $1.02 per car as differentiating log traffic from average traffic through their elimination of the $1,231,069.00 account at page 112 of the brief. It must be remembered that the Commission also eliminated $2,556,773.00 from non haulage expenses, in addition to the above figure, as shown in Appendix F. The difference in the amount of haulage expense used by the Commission and Lamb is due to the different approach to the distribution of this expense.

We are unable to check the calculation by which appellants arrive at the figure of $1.02 per car. If the $1,231,069.00 is divided by $1.02, the quotient is 1,255,950 cars of freight. The Commission on its calculation used only 1,211,775 cars, a difference of 44,175 cars over a period of a year, which for this calculation would seem erroneous.

The Commission used the percentages testified to by appellants' own witness, Pettijohn, for separating the expenses between haulage and non haulage, after eliminating those expenses not directly applicable to the log traffic (R-870-71). On the other hand, Mr. Lamb in his cost study eliminated all terminal expenses by separate operating accounts and also eliminated those accounts which he considered were not strictly applicable to log traffic.

It should also be noted that the gross ton miles used by the Commission in their cost study, includes not only revenue ton miles but an unspecified number of ton miles of company freight (non-revenue). Likewise the cost per car for terminal

or non-haulage expenses, $6.16, has been *understated* by using in the Commission's divisor of loaded cars (revenue and none revenue) 1,211,775, the cars which handled company freight. The Commission recognizes that these facts caused an understatement of the cost when it says (1936 I. C. C. 132): "As heretofore indicated, the cost is also understated because it does not include the cost of transporting non-revenue or company freight."

The Commission also calls attention to the fact that the transportation of company freight is an element to be considered. The one item of coal used in Florida is considerable. All coal is hauled by the balance of the system from mines in West Virginia, Virginia and Alabama to the Florida State line. No compensating service is performed for the balance of the system by the State of Florida.

With these facts in mind it is hard to believe that the figures developed by the Commission truly state a system average, but even assuming that the use of system figures is sufficient to warrant the use of that term, the Commission recognized, as we have heretofore pointed out, that in this particular case, due to particular facts, circumstances and conditions, the cost of transporting freight in Florida was higher than the system average. In Florida transportation of the lowest grade commodity, such as logs, phosphates, etc., is considerable. Also a considerable part of Florida transportation is in perishables. Therefore, a Florida average, as developed by Mr. Lamb, and a system average are not far apart.

(*d*) Appellants at page 146 of the brief discuss and criticize Mr. Lamb's theory of determining out-of-pocket expense

on the Hines to Palatka movement. They charge that his use of five mills per ton mile for transportation of coal used on this train is excessive. When attempting to determine the cost of handling any particular commodity or the expenses in any particular State, it is absolutely proper to charge to that commodity or State the cost of fuel *delivered at point of consumption*. While it is true in the regular charging out of fuel for Florida the system average cost was used, if a direct allocation of expenses by specified States or any specified movement were required, proper adjustments as to the expense of handling company fuel and other materials such as rails, ballasts, etc., should be made, crediting the State or States performing the service and debiting the State or States for which the service was performed.

As Florida has no coal mines or steel mills, all coal and rails necessarily must be hauled to Florida from other states. The Commission recognized that this was proper in connection with its study when it stated: "As heretofore indicated, the cost is also understated because it does not include the cost of transporting non revenue or company freight." (130 I. C. C. 137). Non revenue or company freight as there used means coal, rails, ballasts, etc., such as are used in the operation of the transportation system.

At page 147 appellants state: "The record shows that the Commission's own classification of operating expenses accounts forbids any such charge (R. 132, 182, 243)". The record referred to is copies of the classification of operating revenues and operating expenses of steam roads prescribed by the Interstate Commerce Commission. The reference to 132 is in connection with the cost of material and supplies

used under the general heading "Cost of Repairs." Reference 183 refers to account 394 "Fuel for Train Locomotives." It will be noted that the classification for this account reads in part as follows:

> "This account shall include the cost *delivered on locomotive tenders* of coal, coke, oil, wood, and other fuel consumed by locomotives in transportation train service * * *."

No reference is made in connection with this account, which is the account under discussion, with respect to charging cost of transportation over carrier's own line. However, reference 213 in case 124, where the Commission in its interpretation of accounting classifications states:

> "The cost of fuel shall include its cost delivered to the carrier plus the handling (loading and unloading) expenses up to and including delivery at the chute. No charges for transportation over the carrier's own line shall be included."

There is no conflict as to our views with respect to regularly *accounting for operating expenses*, but when an effort is made *to determine the cost of handling any one commodity or the expenses in any one State*, it is proper to make adjustments for the cost to the carrier of transporting any materials over its own lines up to the point where consumed. For example, if the actual expenses incurred in any one state, say State D, were desired, it would be proper to debit that state with the cost of transporting any materials and supplies over the balance of the system, States A, B and C, to the State line D where these material and supplies are issued or consumed. In making this adjustment, credit would be allowed to the oper-

ating expenses of the various States A, B and C, performing the transportation of the company material and supplies. Should State D perform any like service for States A, B and C, proper credit would be allowed to State D and corresponding debits made to States A, B and C.

Any business man in estimating the *cost* of any undertaking, a bridge, highway, house, etc., would include in his cost the expenses of carriage of the materials. Even though he owned trucks, drays, etc., he would allocate a figure to cover the depreciation, maintenance and operation of his own equipment.

The effect of this adjustment would not in any wise duplicate or inflate the expenses of the system as a whole, but would merely make a proper distribution of the expense to the states where properly chargeable.

The reason the Interstate Commerce Commission prohibits the charging to *operating expenses account*, the cost of transporting company material is that it would create an inflated expense because the cost of transportation would be added to the material and supplies and the expenses incurred in transporting these materials and supplies would likewise be reflected in operating expenses.

This duplication, as pointed out above, does not occur when proper adjustments are made.

ANSWERING SUBPARAGRAPH (c) OF
POINT VII OF APPELLANTS' MAIN BRIEF.

(c) In discussing the evidence of the non-compensatory character of the Cummer scale (p. 149 of appellants' main brief and p. 67 of the supplemental and separate brief of the State of Florida) it is argued that *a letter dated November 8, 1909, and a contract dated January 20, 1911*, are golden nuggets of fact showing that this traffic produced its fair proportion of revenue and bore its fair proportionate burden of the expense of maintaining the Coast Line's System.

Appellants overlook the fact that in October, 1914 and August, 1915 (Appendix A to the report of the Commission, 130 I. C. C. 190) the Florida Commission expressed the view that the Cummer scale of rates was unjust and unreasonable and discriminatory.

The evidence of Mr. Lamb (R 636) and the Commission's own cost study (130 I. C. C. 176 196) show that the actual cost of the transportation of logs in Florida was not covered by the revenue received under the Cummer scale. The Interstate Commerce Commission has given force to the statements of the Florida Commission above referred to, and the appellants have not.

As we have pointed out the Interstate Commission, on ample evidence, has found the Cummer scale of rates to be unreasonable, noncompensatory, discriminatory and unlawful.

Each statement of fact made by the appellants at pages 149 through 153 of their main brief (the section to which we are

now replying) was presented to the Interstate Commerce Commission, and was weighted and considered by that Commission before it found against the contentions of the appellants. The lower court has sustained the Commission's findings not only because they are supported by ample evidence but because they are such as the court would themselves have made on the same record. (4 Fed. Supp. 177, pp. 30 of Coast Line's Statement against Introduction)

The appellants are trying to overthrow the established principle of law that this court, at the instance of shippers, will not reverse the finding by the Interstate Commerce Commission of unjust discrimination against interstate commerce by intrastate commerce, which has been sustained by the court below, when that finding is supported by substantial evidence.

Unreasonableness of the State Rates is an Element in the Determination of Unjust Discrimination

(3) It is argued (pp. 151 of appellants' main brief), that determination of the reasonableness per se of intrastate rates is the exclusive function of the Florida State Commission. This might be true if the reasonableness of a state rate were the sole issue in this case. Here the Interstate Commission, the arm for the exercise of paramount Federal power in such matters of interstate commerce, after a finding that unjust discrimination exists against interstate commerce to a substantial degree because of unduly low intrastate rates is also entrusted with the duty and power to remove that discrimination to the extent of ordering an increase by the carrier of the unreasonable rate or rates which work this unlawful result.

Discrimination against interstate commerce, on the basis that the intrastate rates does not carry its fair proportionate share of the expense of maintaining the transportation system which is used both in interstate and intrastate commerce, necessarily excludes the concept of the reasonableness of the intrastate rates. The ideas are mutually exclusive. In this cause the Interstate Commerce Commission has specifically investigated and established a scale of rates for interstate transportation of logs as reasonable in all its aspects and that finding has been acquiesced in by all parties to this record. It is the same interstate scale of rates which, during all of this investigation, was in force throughout the entire Southern territory (except in the southern part of the Peninsula of Florida, where the interstate rate was, and is, fifteen (15%) per cent higher) and which scale governed much of the intrastate movements of logs in the Southern Territory.

The Commission had the right to treat that interstate scale of rates as the proper and normal yardstick in establishing the relation on which the revenue burden of a carrier's system, used in both interstate and intrastate commerce, should be distributed. The superior power over this subject is with the Congress. The Cummer scale of rates is the lowest scale known in the movement of logs and is used in the most expensive territory covered by the Atlantic Coast Line Railroad Company. It produces a gross revenue oftentimes less than half, and many times barely one-third, of the revenue produced for the same transportation service over the same lines in interstate commerce. It can not be denied that a rate may be so unreasonable that it does not bear its fair proportionate share of the cost of maintaining the transportation system and thereby puts upon other traffic, including the interstate

traffic, that cost of maintaining the System which it should, but does not, bear.

In the use of this property of a rate as an element in determining whether the State rate discriminates against interstate commerce, the Commission, through the delegation of power by the Congress has the superior right to make the determination. Once exercised, the action of the Commission is conclusive except in those instances reserved to the Courts.

In such circumstances a finding as to the reasonableness or unreasonableness of an intrastate rate and an interstate rate is a collateral finding necessary to the ultimate determination as to whether there is or is not discrimination. It is a relevant element in that determination; and, it may very well become, of necessity, a controlling element, when the disparity between the intrastate and interstate rates has become so great that the low intrastate rate does not carry its fair proportionate share of the burden which the law imposes upon it. The disparity, which the law condemns, exists in this case. That disparity and that discrimination have been found in this case by the only body having the right to making the finding. It has been affirmed by the District Court, which responding in a degree to the argument of appellants that they were entitled to a de novo investigation, did make that investigation in so far as the record before the Commission is concerned and that court held that the Commission's finding was such as they would themselves have made.

REPLYING TO POINT VIII APPELLANTS' MAIN BRIEF (P. 156)

THE INTERSTATE COMMERCE COMMISSION IN ITS COST ASCERTAINMENT DID NOT USE THE SYSTEM AVERAGE COST OF HANDLING ALL FREIGHT— IT USED THE SYSTEM AVERAGE COST OF HAULING LOGS.

It is there stated that the District Court in its findings of fact (4 Fed. Sup. 477, 479; p. 34 of Coast Line's Statement against Jurisdiction) found that the Interstate Commerce Commission considered figures "which showed the *average cost* of *hauling logs* over the Coast Line system." (Italics added). The Commission's report, including appendix E (186 I. C. C. 185 and 196) are both based upon the *system average cost of hauling logs.*

The Commission's cost study (Appendix E, 186 I. C. C. 196) is headed as follows:

> "Estimated *cost* of *transporting logs* in Florida for average distance of 81.36 miles, *based on A. C. L. average costs per unit* for calendar year 1929 applied to the average units involved in hauling logs in that State." (Italics added).

We have heretofore pointed out that the average cost per unit *is not a system average cost for average freight;* but, by reason of certain specified and eliminated accounts aggregating $3,836,847 out of the total freight operating expenses of $36,308,813, the Commission worked out a *system average of the cost of hauling logs.* The expense items eliminated by

the Commission aggregated 10.56% of the total freight operating expenses of the Atlantic Coast Line System for the year involved. The purpose of making those eliminations was to ascertain the system average cost *of hauling logs.* To witness this we need only to turn to 186 I. C. C. 186 where the Commission states:

> "Based upon the foregoing (the figure giving the average system cost of hauling *one ton of logs* one mile) the following is a summary of the computation of the cost of transporting the average car of *logs* in Florida the average distance of 81.36 miles." (Parenthesis ours).

Then follows the statement in detail of the Commission's ascertainment of the cost of hauling the average car of logs in Florida the average distance of 81.36 miles (186 I. C. C. 186).

This simple statement would appear to put an end to the claim of appellants that the average system cost used by the Commission was the average cost of hauling all kinds of freight.

If we use the basic figures in the Commission's cost study to arrive at a *system average cost of transporting average freight,* which appellants claim was done, we get the following results:

Total freight operating expenses are the same. $36,308,813.

Apportionment of haulage and non-haulage expenses on the same basis of 70.3539 per cent. to haulage and 29.6461 per cent. to non-haulage gives however—

Haulage 25,544,365.99

Non-haulage	10,764,477.01
(There should be no deduction for less-than-carload freight, for that is a part of average freight).	
Average haulage expense per gross ton mile instead of $0.0021243 becomes	$0.0022028
Average non-haulage expenses per loaded car instead of $6.46 becomes	$8.88
Computation of costs on basis of average log shipment in Florida — haulage expense: 4994 gross ton miles x $0.0022028 per gross ton mile increases to	$11.00
Non-haulage expenses—average per loaded car	8.88
	$19.88
Taxes	1.99
Interest, etc.	5.63
Total cost per car	$27.50 on

basis of *average system* cost of *average freight*. The Commission's cost would be increased by using the *average system cost of average freight* by $2.81 per car; that is, from $24.69 (186 I. C. C. 186) to $27.50. This shows *conclusively* that the Commission *did not use the average system cost of average freight* as claimed by the appellants.

REPLYING TO POINT IX
APPELLANTS' MAIN BRIEF (p. 157)

Appellants contend that "The rate comparisons furnish no cause for the invasion of State Domain by Federal Power."

By this appellants probably mean that rate comparisons cannot be used to show that intrastate rates are so low that they make an unjust discrimination against interstate commerce. Of course comparison of charges by railroads has been for years one of the means of determining the reasonableness or unreasonableness of rates which are under attack.

In a proceeding to determine whether or not intrastate rates make unjust discrimination against interstate commerce, it is for the Interstate Commission to determine what is the value of these comparisons. As was pointed out at page 156 of the Coast Line's main brief, it is for the Interstate Commission to determine whether the rates which are used as a basis of comparison are proper for that purpose.

> *Northern Pacific Ry. Co. v. United States*, 60 Fed. (2d) 302, 308; *I. C. C. v. L. & N. R. R. Co.*, 227 U. S. 88, 98.

In the case at bar the Commission has established interstate rates. Those interstate rates were applicable throughout the entire south, except the southern peninsula of Florida, where they were 15% higher. It was more expensive to render transportation service in Florida than in any other state in which the Atlantic Coast Line then did, or now does, business. We have discussed the use of the quality of reasonableness of intrastate rates in such a proceeding as this in

considering sub-paragraph F of points VII of appellants' brief. We refer to that discussion. It has been necessary to refer a number of times to what is called throughout appellants' brief "the newly reduced rates." At this point appellants state that the supplemental bill shows those newly reduced rates to have been established "in whole or in part upon 22 railroads in 10 states in the southern rate group, and upon 5 railroads in 5 states in the southwestern rate group in intrastate and interstate commerce. They have been established in interstate commerce on four railroads in Florida, viz: Frisco System, Louisville & Nashville Railroad, Georgia and Florida Railroad and Central of Georgia Railway."

We have heretofore pointed out that these rates were used between very few stations on each of those roads, and, with the exception of possibly 3 systems, those rates did not apply over the whole of any system. They did not supplant previously existing rates. Of the four railroads in Florida referred to, the Frisco System operates about fifty miles from the Florida Alabama line to Pensacola. Its log traffic in Florida is "not much." (R-1016). The Louisville & Nashville Road skirts the top of Florida from Pensacola to River Junction, and ther is nothing to suggest the handling of logs in any important quantities there. The Georgia & Florida Railroad, the record shows, has been long in the hands of a receiver, and its necessities require abnormal operation. The Central of Georgia Railway barely gets into Florida, and there is nothing to show these new rates were operative over those lines in Florida. The rates were in operation between a very limited number of stations on the Central of Georgia, and none of these were in Florida. The rates were not in effect in the log producing part of Florida.

REPLYING TO POINT X OF APPELLANTS' MAIN BRIEF (p. 160)

Appellants complain that the "interstate rates prescribed by the Commission for application in Florida were minimum rates, and not otherwise."

Under §13(4) of the Act To Regulate Commerce, the Commission is required to "prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum thereafter to be charged," etc. The rates fixed by the Commission must be observed while in effect by the carriers parties to the proceeding "the law of any State or the decision or order of any State authority to the contrary notwithstanding."

The Interstate Commission found that rates "not less than" those fixed by it were necessary to remove the discrimination against interstate commerce in this case. The Commission in the concluding paragraph of its third report (190 I. C. C. 600) held as follows:

> "Our findings herein and in our prior report on further hearing are without prejudice to the right of the authorities of the State of Florida or of any other interested party to apply in the proper manner for a modification of our findings and order as to any specified intrastate rate on the ground that it is not related to interstate rates in such a way as to contravene the provisions of the interstate commerce act."

Like reservations have been a number of times approved. No more liberal reservation could have been made by the Commission without leaving its duties undischarged.

The Railroad Commissioners of Florida have their full share of responsibility for the circumstances of which they complain. Notwithstanding the fact that the rates for like service on the Seaboard Air Line Rwy. (p. 234 et seq. of First Record Exhibit No. 2), which operates very nearly as much mileage in Florida as does the Atlantic Coast Line, are practically twice as high as the Cummer scale and that the rates of the Georgia, Southern & Florida Railway (p. 238 of First Record Exhibit No. 4) which is a part of the Southern Railway System and operates substantial mileage in Florida, are also approximately twice as high as the Cummer scale; and the rates of the Florida East Coast Railway Company which has more than 900 miles in Florida are also about twice as high as the Cummer scale for this transportation service, the Railroad Commissioners of Florida have taken the position of active partisans in this case from its beginning, clinging to the patent fallacy that the Cummer scale of rates was and is reasonable, and with equal tenacity they have clung to the greater fallacy that it was within "the State Domain" to keep and impose upon a carrier engaged in interstate and intrastate commerce, a rate which worked unjust discrimination against interstate commerce.

The Interstate Commission's reservation in its reports, to which we have referred, points the only way to impartial assistance left to the parties by the circumstances to which we have referred.

There are state-wide interstate rates for the transportation of logs in Florida over the Coast Line, as we have pointed out—these are the rates fixed by the Commission in this case in that part of the state denominated as Northern Florida, and south of that the same scale plus fifteen (15%) per cent.

REPLYING TO POINT XI OF APPELLANTS' MAIN BRIEF (p. 162)

Here the point is made that:

> "The order of the Interstate Commerce Commission, being statewide in its scope was beyond the scope of the issue on which the controversy was tried, and the proceeding was not appropriate nor was the hearing sufficient."

Point was made in the original case as to the scope of the proceeding and was dismissed by this court in *Florida v. United States*, 282 U. S. at 209. It was made in the hearings before the District Court which are reported in 30 Fed. (2) 116 and 31 Fed. (2d) 580 and was likewise disposed of. The lower court disposed of the same question in its findings of fact and conclusions of law (*Florida v. United States*, 4 Fed. Sup. 477; p. 488 of the Atlantic Coast Line's Statement Opposing Jurisdiction, etc.)

The Atlantic Coast Line's answer to the original proceeding in this case, referred to at page 165 of the appellants' main brief did not complain that the *interstate* rates were unjust and unreasonable. Those rates were then practically the same as the interstate rates found by the Interstate Commission to be just and reasonable in its first and second reports, 140 I. C. C. 717; 180 I. C. C. 189. It did not deny the existence of unjust discrimination. The reopened case was tried not only upon the former record and pleadings before the Commission, but also upon the petitions of the Georgia Public Service Commission and the Atlantic Coast Line Railroad Company to reopen the proceedings before the Commission

and on a very greatly extended record of evidence. The petition of the Atlantic Coast Line set out appropriate extracts from the opinion of this court in 282 U. S., and then alleged:

> "Movant respectfully shows that if is necessary that this Commission reopen the said cause and proceed therein to make such additional findings and orders as may be proper in the light of the opinion of the Supreme Court of the United States in this cause." (R-1031).

There followed a full hearing satisfying every requirement of the statutes.

The Commission made detailed findings and again reached the conclusion that the Cummer scale of rates worked unjust discrimination against interstate commerce. Appellee respectfully submits that appellants' point is not well taken.

Appellants also here invoke the rule of comity. Comity works both ways. The Florida Commission has complementary duties under this rule. The authority of the Interstate Commission being paramount and it having assumed jurisdiction first in point of time, comity and courtesy require acquiescence by the state authority if real discrimination is found to exist against interstate commerce. Certainly the Florida Commission should have been non-partisan in the controversy. It should have more evenly held the scales to the end that it might not have been unmindful of the conditions which were bound to work great discrimination against interstate commerce.

REPLYING TO POINT XII OF APPELLANTS' MAIN BRIEF (p. 168).

The appellants here take the position that the jurisdictional facts authorizing the Interstate Commerce Commission to prescribe intrastate rates should be made to "clearly appear." Certainly the findings which the Commission has made and the evidence to which we have referred, make the unjust discrimination against interstate commerce worked by the Cummer scale of rates to "clearly appear."

Probably there has never before been such a wide disparity between interstate and intrastate rates as exists between the Cummer scale of rates and the interstate scale of rates on logs. This disparity was so great as to make interstate commerce in this commodity over the Atlantic Coast Line practically impossible. An intrastate rate of from one-half to one-third of the interstate rate on the same commodity the interstate rate having been found to be reasonable could not carry its fair proportionate part of the expenses of the transportation system which was used for both interstate and intrastate commerce. The loss which was accruing to the Atlantic Coast Line from this traffic, and which would have continued to accrue to it, would probably have been sufficient to have completely destroyed the road financially.

The Atlantic Coast Line earnings were very small for the last year shown in the evidence 1930 the net return on investment was only 2.54%. The court below stated:

> "It is found that the carrier's net return on its investment is steadily falling from year to year." (*Florida v.*

United States, 4 Fed. Supp. 477; p. 37 of the Coast Line's Statements Opposing Jurisdiction, etc.)

The Railroad Company could not have long withstood the great losses which these rates were entailing upon it.

The Commission found as we have seen, that the log traffic in Florida under the Cummer scale was being done at an out-of-pocket loss. The court below says:

> "If log traffic done in Florida on the Cummer scale is at an out of pocket loss, the less of it done the better. The destruction of it would help by stopping a loss. If but a little business be done on remunerative rates so much profit would be substituted. The Commission has given full and expert attention to the situation, and has found that adherence to the level of log rates it has previously established as reasonable in interstate commerce and has applied as a minimum in intrastate commerce in Florida should be continued. We find no such plain case to the contrary as to warrant court interference. The findings and the evidence show the Cummer scale of rates to constitute such a substantial revenue burden on the Interstate carrier and on interstate commerce as to cause a discrimination against the latter and to give the Commission power to remove it under Interstate Commerce Act, §13(4)." (*Florida v. United States*, 4 Fed. Supp. 477; pp. 43 and 44 of the Coast Line's Statement Opposing Jurisdiction, etc.)

In section (*a*) of point XII (p. 169) of appellants' main brief the claim is made by the appellants that the existence of jurisdictional facts is necessary to authorize the Interstate Commerce Commission to prescribe intrastate rates and the determination as to the existence of those facts is a judicial question.

We have discussed at pages 148 through 155 of the Coast Line's main brief practically all the points raised by the appellants in this section of their brief. We feel we need add very little to what is there said.

The vast volume of this log traffic has been pointed out. The extent of that volume has been found by the Commission —that in one year—1928—it constituted 9.4% of the traffic of the Atlantic Coast Line in Florida. (186 I. C. C. 166) 1928 was the last full year of operation of the plants at Eastport, Milldale, and Ortega (suburbs of Jacksonville), where the movements were in trainloads.

The Commission found that in 1928 the Atlantic Coast Line transported a total of 27,119 cars of logs in Florida (186 I. C. C. 166); and it also found:

> "The defendant's Florida log traffic is an important one and the revenue from that traffic has a substantial influence upon the defendant's total revenues. During the 5-year period, 1926-1930, system log traffic averaged 7 per cent. of the total system traffic. Nearly 50 per cent of the system log traffic was in Florida." (186 I. C. C. 166).

The Commission refers to the fact that in 1928 the system log tonnage constituted 7 per cent of the total system tonnage, whereas the revenue from the log tonnage was only 1.9 per cent of the total revenue. (186 I. C. C. 166).

The Commission also found that for the five-year period, 1926-1930, the following number of cars of logs were shipped over the Atlantic Coast Line in Florida: 1926, 36,799 cars; 1927, 35,415 cars; 1928, 27,119 cars; 1929, 13,207 cars, and 1930, 9,376 cars. (186 I. C. C. 169)

The Brooks-Scanlon Corporation operated the mill at Eastport. The Commission found in its first report, 148 I. C. C. 720:

> "'The record also shows that intervenor Brooks-Scanlon Corporation on August 31, 1926, owned timber in Wakulla, Jefferson, Madison, Taylor, Lafayette, and Dixie Counties, Fla., estimated to contain 1,207,432,000 feet.'"

We will not continue to state the full details of the volume of this log traffic, statements as to which have been heretofore made in this, and in the original, brief.

The Cummer scale of rates provides a revenue less than the bare transportation costs of this carrying service. Apply that fact to the volume of the traffic and the discriminatory and destructive power of the Cummer scale of rates becomes immediately apparent.

The Commission finds (186 I. C. C. 189) as follows:

> "Accordingly, on the basis of an average of 7,431 cars a year under normal economic conditions, which basis we believe conservative, the gross revenues under the rates prescribed by the previous order herein would be more than $100,000 a year greater than under the Cummer scale, now in effect. The application of the Cummer scale, therefore, places a substantial burden upon defendant's interstate revenues. If the revenues yielded by the Cummer scale are not sufficient to cover the cost of the service, as the cost evidence indicates, it would follow that part of the above-stated amount would constitute a dead loss in net revenue."

The Kind of Review Which Appellants Claim the Court Must Give the Commission's Findings in this Case.

This question is raised at pages 169 through 181 of appellants' main brief. It is claimed by them that the finding of jurisdiction by the Interstate Commission to deal with intrastate rates "is subject to review by the court and upon such review it is not sufficient that the finding be supported by 'the substantial evidence' rule."

Reference is made to page 148 of the Atlantic Coast Line's main brief for authorities which appear to conclusively hold that the judicial review of the Interstate Commission's finding of unjust discrimination is subject to the same rule as are its other findings; that is, if the finding is sustained by substantial evidence, the court will not set it aside.

We refer to the treatment of this subject by the lower court in its conclusions of law (*Florida v. United States*, 4 Fed. Supp. 477; especially p. 43 of the Atlantic Coast Line's Statement Opposing Jurisdiction, etc.) The finding of this court is *Interstate Commerce Commission v. L. & N. Railroad*, 227 U. S. 88, appears to be very appropriate. There the court held that the power of the Commission to alter existing rates depends upon the fact of their unreasonableness but that the Commission having found no evidence that they were excessive, its order was not to be disturbed. See also the cases of *Merchants Warehouse Co. v. United States*, 283 U. S. 501; and *United States v. L. & N. Railroad*, 235 U. S. 314, 320.

Appellants claim at page 174 of their main brief:

> "In fixing interstate rates the Commission is exercising a legislative function, *while in determining the facts necessary to its jurisdiction over intrastate rates*, it is performing a judicial function."

That statement appears to us to be contrary to every decision which this court has made on the subject. See *United State v. L. & N. Railroad*, 235 U. S. 314, 320.

CROWELL V. BENSON, 285 *U. S.* 22.

Counsel for appellants appear from their statements at page 175 of their main brief to be of the opinion that this court in the *Crowell v. Benson case* ruled that it must give, as to findings of jurisdictional facts made by administrative tribunals, de novo judicial review where such findings involve constitutional rights.

As pointed out in the Atlantic Coast Line's main brief (pp. 150, et seq.) this is incorrect as here applied for the reasons that it presumes that there is a constitutional right involved on behalf of the State of Florida, when there is none. A state has no right to make rates for intrastate commerce which affect other states. The Congress, under its power to regulate commerce, has the power to regulate that commerce which is within one state and which affects other states. *Gibbons v. Ogden*, 9 *Wheat.* 194. The power to determine as between the field in which the state acts and in which the Congress acts, lies with the Congress. It was clearly so held in the case of *Colorado v. United States*, 271 U. S. 153, 165-66, where the court said:

"Because the same instrumentality serves both, Congress has power to assume not only some control but paramount control in so far as interstate commerce is involved. *It may determine to what extent and in what manner intrastate service must be subordinated in order that interstate service may be adequately rendered.* The power to make the determination inheres in the United States as an incident of its power over interstate commerce. The making of this determination involves an exercise of judgment upon the facts of the particular case. The authority to find the facts and to exercise thereon the judgment whether abandonment is consistent with public convenience and necessity, Congress conferred upon the Commission." (Italics added).

Like power is conferred upon the Interstate Commerce Commission as to unjust discrimination. *Crowell v. Benson*, 285 U. S. 22, 50-51; and authorities cited in the 13th note; *Ex Parte Bakelite Corp.*, 279 U. S. 435, 451, and authorities cited in the 8th note.

The mode of determining in such matters where the Constitutional power of the Congress ends and where that of the State begins, is for determination by the Congress or by such means as it may create. This power, if not exercised directly by the Congress may be delegated to executive officers or to tribunals which are not judicial.

Congress had delegated this power to the Interstate Commerce Commission and the determination of the Commission as to discrimination by intrastate rates against interstate commerce, is final when supported by evidence. The State of Florida has no Constitutional right to a judicial review of the Commission's findings.

It must be remembered that the court below did give this subject a *de novo* investigation on the record made before the Commission.

Appellants' main brief at page 179 draws a distinction between the rights of the State of Florida on the one hand and the shippers on the other, apparently claiming that the State of Florida has the right to a *de novo* investigation upon a record made before the court under its independent processes and claiming as to the shippers the right of a *de novo* investigation "upon the evidence taken before the Commission."

As we have pointed out, they are not entitled to either of their claims, but they have had the *de novo* investigation of the kind which they claim the shippers were entitled to, and having had it, they got an adverse decision. That adverse decision was both as to the shippers and as to the State of Florida.

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